THE RIGHTS OF BENEFICIARIES AS AFFECTED BY THE WIDOW'S ELECTION TO TAKE AGAINST THE WILL.—The various provisions of a will are frequently so intimately connected that, if one be rejected, the enforcement of the others will entirely defeat the presumed intention of the testator. The elementary rule that in construing a will the testator's intention is to govern, has, therefore, led to a corollary hardly less universal: that where part of a will is valid and part void, and the invalid portions cannot be eliminated without destroying the general scheme of testamentary disposition, the entire will must be declared void.[1]

Where a provision is invalid because of a legal defect inherent in the will itself[2] or, perhaps, where the provision is entirely inoperative because of its renunciation by the intended beneficiary,[3] the validity of the will as a whole depends solely on the effect, under the above test, of the necessary rejection of the invalid provisions upon the general scheme in the will. On the other hand, where the will is valid in all its provisions and the only circumstance threatening the scheme of distribution is the successful assertion by a stranger to the will of a right adverse to that of a beneficiary to the specific subject matter devised to him, it cannot properly be said that the devise is void or even inoperative because the devisee has been subsequently stripped of a part or all of the benefits intended to be conferred thereby. Hence, the mere disappointment of a devisee by the possessor of a paramount right can be no ground for questioning the validity of the will by the application of the foregoing rule. Therefore, when such assertion of an adverse right is conditioned upon and preceded by a renunciation of a provision in the will intended for the benefit of the person relying upon the right, as where a widow elects to assert her dower rights rather than to take under the will, it follows necessarily that the validity of the will must depend, not upon the results to specific beneficiaries of the establishment of the adverse right, but solely upon whether the renounced provision can or cannot be eliminated without violence to the general scheme of distribution. Consequently if such elimination is possible, the test is no further applicable and the mere contravention of devises consequent upon the assignment of dower out of the estate cannot affect the validity of the other provisions.[4] This conclusion obtains, it would seem, even in jurisdictions where the results of the election are thrown wholly upon the beneficiary whose property happens to be assigned to the widow in satisfaction of her claim.[5]

Even conceding that the mere contravention of legacies or devises justifies an examination of the effect thereof upon the testator's general scheme, the validity of the will may, in most jurisdictions, be sustained upon an independent ground: the possibility of adjusting the rights of all the beneficiaries in such manner as actually to effectuate the original testamentary plan. This result may be accomplished by the application to the situation of certain well recognized principles of equity. Thus where the provision rejected is a life estate and the

[1]Estate of Fair (1901) 132 Cal. 523; Eldred *v.* Meek (1899) 183 Ill. 26.

[2]Johnston's Estate (1898) 185 Pa. St. 179; Chilcott *v.* Hart (Colo. 1895) 35 L. R. A. 41.

[3]Howard *v.* Smith (1889) 78 Ia. 73.

[4]Allen *v.* Hannum (1875) 15 Kan. 625; Mitchells *v.* Johnsens (Va. 1835) 6 Leigh 461; Noecker *v.* Noecker (1903) 66 Kan. 347; Roe's Admr. *v.* Roe (1871) 21 N. J. Eq. 253.

[5]Darrington *v.* Rogers (Md. 1843) 1 Gill. 403; Gainier *v.* Gates (1887) 73 Ia. 149; and see *Re* Estate of Vance (1891) 141 Pa. 201.

remainder men are affected equally by the renunciation, the acceleration of the enjoyment of their devises and legacies diminished proportionately will equitably compensate them for such diminution.[6] But where the assertion of dower rights disappoints a devisee of a present estate,[7] or where the acceleration of the remainders will prejudice the interest of residuary legatees,[8] equity will postpone the vesting of such remainders and sequester the renounced provisions for their benefit. Further, where the provisions sequestered are not sufficient to compensate the beneficiaries prejudiced, and of course, where no provision whatever was made for the person claiming adversely, the devisees whose property has been taken to satisfy the claim for dower, a common charge upon the whole estate, are, according to well settled principles of equity, entitled to contribution by the other beneficiaries who have profited by the removal of the burden.[9] By the application of these rules equity is able in most cases to adjust the rights of the parties in accordance with the will of the testator.

In a recent case, *Fennell* v. *Fennell* (Kan. 1910) 106 Pac. 1038, the plaintiff was a remainderman under a will of a specific half of the testator's real property and the defendants, his brothers, remaindermen of equal portions of the other half, all being limited upon a life estate to the widow. Upon her renunciation, she was assigned in fee simple the land in which the plaintiff's interest had been created. Upon the plaintiff's petition the court declared the entire will void upon the ground that, as the assignment to the widow resulted in depriving the plaintiff, a favored son, of all benefits under the will, it was impossible to enforce the other provisions without destroying the entire scheme of the testator. The remaining property was, therefore, distributed under the laws of intestacy among the children equally. The result reached seems unsound. Inasmuch as the renunciation of a life estate merely affected the acceleration of the remainders, it is clear that the provision rejected was not so closely connected with the others as to invalidate the will. Nor is the mere disappointment of the plaintiff a sufficient ground for questioning its validity. The court moreover apparently overlooked the plaintiff's right to contribution from the other beneficiaries,[10] the recognition and enforcement of which would have made possible a division of the property in controversy in the exact proportions indicated by the testator in his division of the larger tract.[11] Relief by contribution seems preferable to that granted by the court, not only because adapted to effectuate the intention of the testator but also because applicable to controversies between all possi-

[6]Waddle *v.* Terry (Tenn. 1867) 4 Cold. 51; *In re* Schultz's Estate (1897) 113 Mich. 592; Parker *v.* Ross (1897) 69 N. H. 213; Yeaton *v.* Roberts (1854) 28 N. H. 459.

[7]McReynolds *v.* Counts (Va. 1852) 9 Gratt. 242; Colvert *v.* Wood (1894) 93 Tenn. 454; Maskell *v.* Goodall (O. 1858) 2 Disn. 282; Timberlake *v.* Parish's Executor (Ky. 1837) 5 Dana 346.

[8]Jones *v.* Knappen (1891) 63 Vt. 391, 14 L. R. A. 293 and note; but see Ferguson's Estate (1890) 138 Pa. St. 208.

[9]Latta *v.* Brown (1896) 96 Tenn. 343, 31 L. R. A. 840 and note; Eliason *v.* Eliason (1869) 3 Del. Ch. 260; Sandoe's Appeal (1870) 65 Pa. 314; Henderson *v.* Green (1872) 34 Ia. 437; but see Darrington *v.* Rogers *supra.*

[10]The principle of contribution was recognized by this court in another case decided at the same time, Pittman *v.* Pittman (Kan. 1910) 107 Pac. 235.

[11]Lilly *v.* Menke (1894) 126 Mo. 190.

ble beneficiaries. The rule as laid down will, on the other hand, work approximate justice only if all the parties interested are related to the testator within the same degree and therefore able to take property equally under the law of descents.

EXTRATERRITORIAL EFFECT OF A DECREE OF DIVORCE UPON THE CLAIM FOR ALIMONY.—Just as marriage, in creating a new status, necessarily affects an adjustment of the property rights of the contracting parties,[1] so a decree, affecting or destroying this status works a corresponding readjustment of such incidental relations.[2] Thus a divorce *a vinculo* would seem to annihilate the status as effectually as the death of one of the parties.[3] In such event the courts will recognize rights which have become vested in either spouse and deny those which were merely inchoate, the former having acquired an existence independent of, whereas the latter were still contingent upon, the continuation of the status.[4] And so in general, in the absence of saving statutes, divorce extinguishes the wife's right of dower.[5] The claim for alimony is, however, neither in the nature of a property right,[6] nor is it inchoate, but is founded rather upon the marital obligation of the husband to support and maintain his wife,[7] and constitutes an imperfect obligation which in theory continues to rest upon the husband after the dissolution of the status unless forfeited by the wife's misconduct,[8] but which in practice must be made specific by a decree of the court in order that it be binding upon the husband.[9] In this it is distinguishable from the right of dower, for the wife must in general make claim and prove its merit,[10] whereas dower vests by operation of law. It would of course seem that no rights could be predicated upon a status which has been destroyed,[11] a proposition typified by the extinguishment of dower upon divorce, and yet in the case of rights arising

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[1] 10 COLUMBIA LAW REVIEW 147.

[2] 2 Bishop, Marriage, Divorce & Separation § 1623.

[3] Roberts *v.* Fagan (1907) 76 Kan. 536.

[4] Arrington *v.* Arrington (1889) 102 N. C. 491; 2 Bishop, Marriage, Divorce & Separation § 1623.

[5] 5 COLUMBIA LAW REVIEW 400. Such legislation, indeed, would not seem unreasonable in preserving this inchoate interest of the wife, particularly, if not solely, in the case where the divorce is granted upon the misconduct of the husband, for surely if the annihilation of the status is as complete thereupon as in the event of death, it would seem more proper that the right should vest, rather than suffer destruction.

[6] Daniels *v.* Lindley (1876) 44 Ia. 567. The wife is generally treated as a creditor even before decree, for the purpose of avoiding a conveyance in fraud of her right to alimony. Picket *v.* Garrison (1888) 76 Ia. 347; see Bongard *v.* Block (1876) 81 Ill. 186. As to the nature of the right after decree, see 3 COLUMBIA LAW REVIEW 356; 7 COLUMBIA LAW REVIEW 135.

[7] Romaine *v.* Chauncey (1882) 129 N. Y. 566; 1 Bishop, Marriage, Divorce & Separation § 1385.

[8] Harris *v.* Harris (Va. 1878) 31 Gratt. 13.

[9] Romaine *v.* Chauncey *supra;* Livingston *v.* Livingston (1903) 173 N. Y. 377.

[10] The court may under proper circumstances decree alimony of its own motion.

[11] Gould *v.* Crow (1874) 57 Mo. 200; Wilde *v.* Wilde (1873) 36 Ia. 319.